In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 406

WILHELMINA SUMI,
Petitioner,

vs.

ALSIE M. YOUNG,
Respondent.

PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this Honorable Court for a rehearing. Realizing that a lengthy printed document is an added tax on the time and strength of the Court, Petitioner will be brief and will present but a single point for consideration—a point so vital, however, that Petitioner sincerely be-

lieves it warrants a reconsideration by this Court of its decision and Opinion.

Section 943 of the Code of Alaska (Act of June 6, 1900) Petitioner earnestly contends does confer jurisdiction *in the instant case,* and Petitioner urges as follows:

I.

SECTION 943 OF THE ALASKA CODE IS NOT "INCONSISTENT" WITH SECTION 128 OF THE JUDICIAL CODE AS TO THE APPEAL IN THE INSTANT CASE.

This Court, in its Opinion and with reference to Petitioner's contention, says:

> "This proposal is in conflict with the purpose and limitations of the later acts of 1911 and 1925. These are of general application, and *any provision of the Alaska Code concerning appeals to the Circuit Court of Appeals inconsistent with them is ineffective."**

Our prime point in this case has been and is that the provisions of Section 943 of the Alaska Code *are not inconsistent* with the provisions of Section 128 of the Judicial Code.

Section 943 of the Alaska Code is the prior enactment. It covers appeals from all orders, without limitation made by the District Judge in probate cases, and had been in full force and effect for eleven years before the Judicial Code was enacted in 1911.

Other sections of the Alaska Code covering appeals in other Special Proceedings (Writs of Review, Sec-

*Italics throughout are ours unless otherwise indicated.

tion 551; Mandamus, Section 565; Habeas Corpus, Section 608; and Contempt, Section 623) also had been in full force and effect for eleven years before the enactment of the Judicial Code.

And so, too, had been still another section of the Alaska Code (Section 504, Appendix our Brief, page ix) covering appeals in certain specified cases to the Supreme Court of the United States and to the Circuit Court of Appeals,

> "in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars."

Thus, for *eleven years* before the Judicial Code was enacted, there was in existence as a part of the jurisprudence of Alaska, a complete and comprehensive appellate procedure.

When the Judicial Code was enacted in 1911, only one of the above-mentioned sections was carried into it, i. e., Section 504. This became Section 247 of the Judicial Code. The other sections, specified above, including Section 943 "On Appeals in Probate Cases", were left undisturbed—they were not included in the "Repealing Provisions" of the Judicial Code of 1911 (Stat. 1910-1911, p. 1168, Chap. 14), nor were they superseded nor limited by the Judicial Code in any way. In fact, Section 504 (which became Section 247 of the Judicial Code), *excludes* from its provisions all of the subject-matter covered in the sections relating to Special Proceedings (including probate) enumerated above, by specifically providing in its very language that it covers

> "*all other cases* where the amount involved or the value of the subject-matter exceeds five hundred dollars."

In 1925, when the Judicial Code was amended, this Section 247 was repealed, and its subject-matter became a part of Section 128 of the Judicial Code. The jurisdictional limit was increased by this provision:

> "in all other civil cases where the value in controversy, exclusive of interest and costs, exceeds $1000;"

But here again, in 1925, although the "Repealing Provisions" are detailed and extensive (43 Stat. 941) there is no repeal of those sections of the Alaska Code, then in effect for twenty-five years, dealing with Mandamus, Contempt, Writs of Review and Probate Cases. The subject of Habeas Corpus is covered under Section 128. *Therefore, if the enactment of Section 128 of the Judicial Code in 1925 had any effect whatever to supersede or limit the provisions of these enumerated sections of the Alaska Code, then twenty-five years old and themselves enactments of Congress, such effect could only be manifest in those cases where there was a question of dollars and cents involved—a definite value—in controversy.*

We make no contention that Section 128 of the Judicial Code (enacted by Congress in 1925) does not overlap Section 943 of the Alaska Code (enacted by Congress in 1900) *in those cases where there is a definite amount in dollars and cents in controversy.* To that extent only, we submit, it may be said that the Alaska Code Section 943 became "inconsistent" with

the later enactment, Section 128 of the Judicial Code, and therefore "ineffective", as stated in the Opinion herein.

In this connection, counsel desires to correct an answer made by him during oral argument to a question asked by Mr. Justice Cardozo. The question, in substance, was:

> "Is it your contention that Section 943 covers appeals in probate matters from Alaska no matter what amount is involved in controversy."

On the spur of the moment, we answered, "Yes".

That, however, is not our contention. *We do not contend where a matter of dollars and cents is in dispute, that an amount less than $1000 in controversy is appealable under Section 943. That question, we respectfully submit, is not before this Court in the instant case,* and, if the Court please, the Court need not express an opinion thereon as to whether probate matters involving an amount in controversy less than $1000 are appealable or not under Section 943. Here, in the instant case, there is an Order in probate which does not involve a question of dollars and cents, no value whatever in controversy, and therefore there is *no conflict between the provisions of Section 943 and Section 128 of the Judicial Code, which provides for appeals "in all other civil cases wherein the value in controversy * * * exceeds $1000".* The appeal allowed by Section 943 in the instant case is one which has existed since the enactment of the Alaska Code (June 6, 1900). It is different entirely from any provided for in the Judicial Code, and is therefore not "in-

consistent" with the provisions of that Code. The Judicial Code does not purport to be the sole source of jurisdiction of the Circuit Court of Appeals with respect to appeals from the District Courts of Alaska.

II.

THE ORDER MADE BY THE DISTRICT JUDGE—ISSUING LETTERS OF GUARDIANSHIP TO RESPONDENT—IS PALPABLY IN ERROR.

We do earnestly contend that the Order made by the District Judge in the instant case is appealable under Section 943, i. e., the Order granting, in error, Letters of Guardianship to Respondent, and granting these Letters under a mistaken conception of the law of guardianship—that the Court is bound to follow a testamentary appointment regardless of the welfare, best interests and wishes of the minors.

In the instant case, the District Judge, in his Opinion (R. p. 103) says:

> "It is hard to take them away from the grandmother, but I see no alternative unless I violate what I really believe, and that is that Alsie M. Young is a perfectly competent and fit person. I am not finding that the grandmother is not a fit person. I am simply being *governed by that which I think is compulsory—the provision of the Will.*"

The District Judge, having found the testamentary appointee to be a competent and fit person, ruled that the provisions of the Will were compulsory and binding upon him, and this regardless of the best interests,

wishes or welfare of the children. He does speak of his right to set aside the provisions of the Will if he is convinced that they are to the "disadvantage of the children", but he shows that in his mind this "disadvantage" is affected only by the question as to whether or not the testamentary appointee is a "perfectly competent and fit person to have charge of the children".

This view of the law by the District Court we contend is error. The prime consideration, when dealing with minors, is, of course, the welfare and best interests of such minors. It requires no citation of authority to sustain this well-established and age-old doctrine. The testamentary appointment of a guardian of minors is not sacrosanct, is not "compulsory", unless it serves the best interests and welfare of such children. And the best interests and welfare of the minors include the consideration of many factors other than the competency or fitness of the testamentary appointee.

The error of the District Court in holding the provisions of the Will "compulsory" constitutes the principal point urged for reversal of this case on its merits, and presents a substantial question in controversy for determination by the Circuit Court of Appeals (R. p. 59).

III.

THE HUMAN VALUES.

In the instant case, speaking through the cold pages of type and the prosaic argument as to jurisdiction, is the intensely human plight of these two children, about to be taken from their grandmother in Fairbanks, Alaska, where they were born and have been brought up, and to be given into the hands of the Respondent, a rural mail-carrier (R. p. 83) living in the small town of Coleman, Michigan, and who has a family of three children of his own (R. p. 85). No criticism whatever is made as to his fitness, competency or character. These may be and probably are beyond reproach. But it does not necessarily follow that the best interests and welfare of the minors will therefore be served by giving the children into his custody to be "merged", so to speak, with his family merely because they are "bequeathed" to him. He is an absolute stranger to the minors and has not even seen them, nor has his wife nor his own children ever seen them (R. p. 94). These minors are to be taken from their maternal grandmother, who has cared for them more than half of their lives, and with whom they have lived since the death of their mother (R. p. 70), and for long periods of time prior thereto (R. p. 72). The grandmother testified (R. p. 70):

> "I have taken care of them just as though they were my own, furnishing them with food, clothing and schooling. Since the death of Mayme Helen Young, mother of these two children, I have had them with me all of the time." (R. p. 74.)

Furthermore, it was admitted by all parties that the children preferred to stay with their grandmother. The Court says (R. pp. 80-81):

> "I think I shall accept as a condition in this proceeding, without any proof, that in their present situation, having lived a good deal of the time with their Grandmother, that they have a natural affection for her and would like to stay with her. I think I will accept that as the fact, the situation."

Nevertheless, the children are to be given into the custody of Respondent and his family, thousands of miles away from Fairbanks, with the expectation and hope that they will fit into this situation and environment. This is experimenting with the welfare, best interests, and future happiness of these minors in a way which the Courts discourage.

It is perhaps safe to assume that no Court would consider sending these young children on any such doubtful journey, or would thus experiment with their future in that fashion, if the Court had merely to choose between the established fitness and competence of the grandmother and the established fitness and competence of the stranger. As a matter of fact, the trial Court in this case would not have done so either, except that the Court felt itself bound to follow the Will—"I am simply being governed by that which I think compulsory—the provision of the Will" (R. p. 103).

The error of the District Judge of Alaska was flagrant, holding himself bound by the provisions of

the Will, contrary to the overwhelming weight of authority that his first consideration in such a case, and of paramount importance above all others, the cardinal principle to be applied, is the welfare, best interests and happiness of the minors.

Even though the children (now nine and ten years of age [R. p. 117]) are not of legally choosing age, nevertheless their wishes are a circumstance to be taken into consideration. In our Brief on the Merits in the case, filed in the Circuit Court of Appeals, we cited the case of *Willet v. Warren* (Wash.), 76 Pac. 273, where the Court said:

> "And, while it is true that she is not of a choosing age, so far as the law is concerned, her choice, even at a younger age, is a circumstance to take into consideration in her disposition * * * the main consideration is the welfare of the child * * *. The respondent and her husband are not residents of this State. * * * and, while the record discloses nothing against the character of the respondent and her husband, it seems to us, under all the circumstances of this case, in consideration of the comparative locations of the different applicants, one being outside of the jurisdiction of this court and the other within it; * * * that it would be more in conformity with justice and to the best interests of the ward that the relationship existing between Mildred and the Willets should not be disturbed, and that she should be allowed to remain in the house that has sheltered and protected her for so long until she arrives at the age when she can choose her own guardian."

This language is particularly applicable to the instant case, although, of course, the facts are not the same. In the instant case, if the judgment of the District Court is permitted to stand, the children will be taken from their grandmother with whom they wish to remain; and, even though they are not of legally "choosing age", their choice "is a circumstance to take into consideration in (their) disposition"; and they are to be placed in the care and custody of strangers outside of the jurisdiction of the District Court of Alaska. And while the record discloses nothing against the character of the strangers, nevertheless, to use the language of the cited case,

> "under all the circumstances of this case, in consideration of the comparative locations of the different applicants, one being outside of the jurisdiction of this Court and the other within it; * * * it would be more in conformity with justice and the best interests of the ward(s)"

that they be allowed to remain with their grandmother.

The Order and Judgment of the Probate Court (R. p. 31) and the Findings of Fact (R. p. 40) and the Conclusions of Law (R. p. 44) and the Order and Judgment of the District Court of Alaska (R. p. 51), may be searched in vain for any reference whatever to the best interests, welfare and happiness of the minors. The palpable error of the Court below was duly assigned as such (R. pp. 58-59, Assignments of Error II and III).

IV.

REASON FOR THE RULE THAT THE BEST INTERESTS, WELFARE AND HAPPINESS OF THE MINORS SHOULD PREVAIL.

The reason for the doctrine that the best interests, welfare and happiness of the minors should govern, and not the provision in the Will, in and of itself, is obvious. It cannot be said that merely because there appears in the Will of the mother of these minors a provision designating a stranger as and to be the guardian of their persons, that such designation, standing alone, indicates the mother so intended it. Any such interpretation of the Will overlooks entirely the various circumstances and conditions under which it may have been made. No one knows what influences were at work in the mother's mind, how well or ill she was, whether she really knew the full import of the words used in the composition of her Will, or, in fact, whether the Will was indeed her own or the idea of another person entirely, who had, perhaps, by argument, cajolery or influence, caused her to make such provision. This argument is strengthened by certain statements which appear in the Record in the instant case. The Protest filed by the grandmother in the Commissioner's Court recites that the mother,

> "while suffering excruciating physical pain and under the influence of opiates, at her home in Fairbanks, Alaska, and in the absence of her mother the said Wilhelmina Sumi and her sisters and other relatives, did sign what purports to be her Last Will and Testament" (R. p. 8).

And the Motion to Dismiss or For a Continuance (R. p. 13) filed in the Commissioner's Court recites:

> "That her (the grandmother's) daughter, Violet Winbauer, is an important and necessary witness in her behalf in the hearing of this matter; and if present could and would testify that she was at the home of Mayme Helen Young, her sister, before and after March 21, 1934, the day the said sister signed what purports to be her Last Will and Testament; that her said sister suffered intense physical pain both before and after the said day, unless when under the influence of opiates, which were administered to her at frequent intervals, and that on said day she was in no mental condition to make a will; that while she was in the house on said day, she had no knowledge that her sister, Mayme Helen Young was signing a will and only knew that she did after it had occurred."

The above quotation is taken from the Record merely to emphasize the importance of giving effect to the rule that the bests interests and welfare of the minors is controlling, as against the mere testamentary appointment of a guardian.

It cannot have been intended that the District Court of Alaska could thus announce an important rule of law with reference to guardianship, manifestly in error, and yet be the Court of last resort. If this were true, then there might be in effect in each of the four far-flung Districts of Alaska, a different rule of law with respect to this subject matter. Such rule could, in turn, be changed by each succeeding Judge in each District. We submit that Congress did not so intend to vest the District Court of Alaska with any such power.

V.

ALLOWANCE OF APPEAL IN INSTANT CASE IS NOT PREJUDICIAL TO JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

Allowance of the appeal in the instant case will not precipitate upon the Circuit Court of Appeals a mass of appeals in inconsequential matters. All cases concerning dollars and cents in controversy, claims against an estate, payment of debts, accounting, distribution and other matters where a definite amount is in dispute, must be in the statutory amount of $1000 or more, in order to be appealable. *As to all such cases, the provisions of the Judicial Code may be said to govern and to limit the application of Section 943 of the Civil Code of Alaska.* However, we respectfully submit, it is not necessary for the Court to hold that Section 128 of the Judicial Code, and not Section 943 of the Civil Code of Alaska, applies to such cases, because, if you please, *that question is not before the Court.*

The only matter before the Court in the instant case, is the appeal from an Order granting Letters of Guardianship; a matter not resting in any value in controversy whatever, but specifically provided for nevertheless by Section 943. The error of the District Court consists in granting, under a mistaken conception of a rule of law, Letters of Guardianship to a testamentary appointee, solely because the Court held that the provisions of the Will were "compulsory" if he found that the appointee was a fit and proper person.

We repeat that Section 943 of the Alaska Civil Code, by its very language, specifically provides for an appeal from such an Order of the District Judge of Alaska. It states that such an Order

> "shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court."

We submit that Congress intended that there should be a tribunal to correct such errors of District Judges of Alaska, and that Section 943 was, therefore, permitted to remain on the statute books when the Judicial Code was enacted and amended, and that such Section was not repealed nor superseded by the Judicial Code, nor did the Judicial Code limit its application except in those cases where dollars and cents are involved.

The error of the District Judge is not academic nor is it harmless. It is vital, and has an immediate and very serious effect on the lives of two individuals, It should not be permitted to stand.

VI.

THIS IS INDEED THE COURT OF LAST RESORT FOR THESE MINORS.

Only the decision of this Court can now prevent the taking of these children from their grandmother, removing them from Fairbanks, Alaska, into an entirely new and strange environment, and "merging" them with a family they have never seen, and no member of which has ever seen them, thus experimenting,

under doubtful circumstances, with their future. Certainly the decision of the District Judge of Alaska should be reviewed by a superior tribunal so that a correct rule of law shall govern the case; that, regardless of the fitness or competency of the testamentary appointee, the District Judge shall be ordered to take testimony and evidence to determine how the interests, welfare and happiness of the minors shall be best served, and shall be instructed that the provisions of the Will are not "compulsory" if, regardless of the competency of the testamentary appointee, the Judge shall find that the best interests, welfare and happiness of the children require that they should be permitted to remain with their grandmother in Fairbanks.

We respectfully petition the Court for a rehearing and for a ruling that *Section 943 specifically provides for the appeal in the instant case.* In this behalf, we earnestly and respectfully urge that such construction will not place this section "in conflict with the purpose or limitations" of Section 128 of the Judicial Code, nor "inconsistent" with its provisions, but that the appeal provided for by Section 943 is complementary to it; that such decision may specifically state it makes no mention at all of other probate matters, these not being before the Court, particularly claims, debts and accountings concerning items less than $1000, as to whether or not they are or are not covered by Section 943. In this view of Section 943, the words "in the manner" would apply only to allowed and permitted appeals such as that in the instant case, and would not "relieve them (such appeals) of requirements

generally applicable to cases in the Courts of the Territory", as mentioned in the Opinion.

On behalf of these children and their grandmother, we bespeak for them the Court's earnest consideration of this Petition.

Dated, San Francisco, California,
March 17, 1937.

Respectfully submitted,
HERMAN WEINBERGER,
Attorney for Petitioner.

LOUIS K. PRATT,
Of Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for the Petitioner in the above entitled cause, and that in my judgment the foregoing Petition for Rehearing is well-founded in point of law, as well as in fact, and that said Petition for a Rehearing is not interposed for delay.

Dated, San Francisco, California,
March 17, 1937.

HERMAN WEINBERGER,
Attorney for Petitioner.